

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC**

In the Matter of	)	
	)	
Encouraging the Provision of New	)	GN Docket No. 18-22
Technologies and Services to the Public	)	

**REPLY COMMENTS OF ELEFANTE GROUP, INC.**

Elefante Group, Inc. (“Elefante Group”), by its attorneys, hereby submits its reply comments in the above-referenced rulemaking proceeding.<sup>1</sup> Elefante Group applauds the Commission for taking on the task of adopting rules to implement Section 7 of the Communications Act, as amended (the “Act”).<sup>2</sup> While Section 7 has been in effect for several decades, it has not been relied upon extensively, despite the introduction of numerous new communications technologies and services as well as many breakthroughs in the use of the radiofrequency spectrum by operators in numerous industry sectors. Having a regulatory framework in place that clarifies what the Commission will look for in a Section 7 request, as well as what procedures will apply, will foster certainty and help remove whatever disincentives might exist to its invocation as well as facilitate a consistent treatment of such requests. Clear Section 7 procedures and standards, as a key element of a comprehensive national policy promoting new technologies and services, would help foster investment and innovation and aid the United States as it seeks to maintain its leadership position.

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<sup>1</sup> See *Encouraging the Provision of New Technologies and Services to the Public*, Notice of Proposed Rulemaking, GN Docket No. 18-22, 33 FCC Rcd 2512 (2018) (“*NPRM*”).

<sup>2</sup> 47 U.S.C. § 157 (“Section 7”).

## I. BACKGROUND

Elefante Group, a Denver corporation founded in 2015, plans to deploy persistent, unmanned stratospheric airborne platform stations, or STRAPS, in the United States in the next few years to provide high-capacity, low-latency stratospheric-based communications services (“SBCS”) to support the rapid deployment of 5G solutions in urban and rural markets in addition to other applications. In these efforts, Elefante Group is working with Lockheed Martin Corporation on the platform and communications technologies. On May 31, 2018, Elefante Group filed a Petition for Rulemaking asking the Commission to commence a rulemaking to establish SBCS in certain Ka-band and E-Band spectrum and requested Section 7 treatment.<sup>3</sup> Elefante Group asked the Commission to treat its Petition under Section 7. As such, Elefante Group requested that the Commission, within one year, institute a rulemaking proceeding to enable SBCS and then, under Section 7, conclude that rulemaking within a subsequent one-year period.<sup>4</sup> While the Commission should address Elefante Group’s request independent of the outcome of this rulemaking proceeding, because Section 7 is already in effect regardless of the adoption of any rules in the instant docket, Elefante Group is interested in seeing the Commission adopt clear Section 7 rules and procedures to govern future requests by those proposing new technologies and services.<sup>5</sup>

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<sup>3</sup> See *Petition to Modify Parts 2 and 101 of the Commission’s Rules to Enable Timely Deployment of Fixed Stratospheric-Based Communications Services in the 21.5-23.6, 25.25-27.5, 71-76, and 81-86 GHz Bands*, Petition for Rulemaking (filed May 31, 2018) (“Petition”).

<sup>4</sup> See *id.* at 103-112. In the *NPRM*, the Commission proposed to interpret Section 7 to cover petitions for rulemaking. See *NPRM* at ¶ 9. The record in this docket indicates no opposition from commenters to the Commission’s proposal as a general principle.

<sup>5</sup> In the *NPRM*, the Commission proposes that applicants and petitioners with filings pending at the time rules are adopted should have the ability to submit a Section 7 request. *Id.* at ¶ 29. Although the Commission might make such an opportunity available, this should not affect the timely processing of Section 7 requests that pre-date the adoption of rules.

## II. DISCUSSION

Elefante Group concurs in the support generally expressed in the record for rules implementing Section 7.<sup>6</sup> Petitions and applications that involve new technologies and services and that, therefore, might qualify for Section 7 treatment, are likely to take a variety of forms – for example, petitions for rulemaking, license applications, and waiver requests. However, regardless of the form of a filing underlying a Section 7 request, where the introduction of such new technologies and services would be in the public interest, the Commission must act within one year as Congress plainly intended.<sup>7</sup> As the Commission has acknowledged, “too often regulatory delays can adversely impact newly proposed technologies or services.”<sup>8</sup>

While Section 7-worthy petitions and applications might, on average, prove to merit being granted, Elefante Group refrains from suggesting that, as a category, there should be any sort of presumption in favor of granting Section 7 petitions and applications.<sup>9</sup> Rather, the benefit of Section 7, on its face, is to provide for swift Commission deliberation and concrete action to ensure that meritorious new technologies and services are deployed rather than left to languish due to administrative regulatory delays. As CTIA notes, there is a “basic principle that the Commission should facilitate, rather than delay, technological innovation.”<sup>10</sup> However, to fulfill this principle, the Commission must do more than determine that a new technology or service is “in the public interest.” Rather, if the technology or service is in the public interest, the

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<sup>6</sup> See, e.g., Comments of CTIA at 4-5; Comments of AT&T at 3-4; Comments of Qualcomm Incorporated at 2. All references to “Comments” of third parties in this Reply are to comments filed in GN Docket No. 18-22 on May 21, 2018.

<sup>7</sup> See 47 U.S.C. § 157(b).

<sup>8</sup> NPRM at ¶ 6.

<sup>9</sup> Accord Comments of CTIA at 5.

<sup>10</sup> *Id.* at 4.

Commission must take action within one year that enables the deployment of that service or technology. Otherwise, Section 7 would be relegated to being just mere words.<sup>11</sup>

Thus, for example, a petition for rulemaking to have the Commission adopt rules to enable a new technology or service should be acted upon, whether granted or denied, within one year of its filing. For this reason, Elefante Group joins the Telecommunications Industry Association (“TIA”) and the IEEE 802 LAN/MAN Standards Committee (“IEEE 802”) in supporting the Commission’s proposal to swiftly release for public comment any petition (or application) that meets the threshold criteria for Section 7 consideration.<sup>12</sup> Further, when a rulemaking is instituted by the Commission to consider rules for a new technology or service, whether in response to a petition for rulemaking that merited Section 7 treatment or not, that rulemaking should be completed within one year as required by Section 7.<sup>13</sup>

In the remainder of these Reply Comments, Elefante Group addresses several comments that advise the Commission to exercise caution when promulgating Section 7 rules. While Elefante Group agrees with several commenters as a general matter that codification of Section 7 rules should not undermine Commission consideration, adoption, and implementation of regulatory frameworks and licensing regimes, the Section 7 rules should make plain the

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<sup>11</sup> In several places, the *NPRM* recognizes that a positive decision on a Section 7 request must go beyond a public interest determination and involve regulatory measures which advance the deployment of the new technology or service. *See, e.g., NPRM* at ¶ 24 (the “overall process” and “core issues” include “the merits and public interest associated with the particular petition” and “how best to ensure that the proposed technology or service (whether new or not) can be used to serve the public”).

<sup>12</sup> *See* Comments of TIA at 3 (“Comments of TIA”); Comments of IEEE 802 at 1-2. *See also NPRM* at ¶ 22. Elefante Group agrees that Section 7 proceedings may be contentious, as are many other proceedings, and that clear, comprehensive procedural rules should be established. *See* Comments of TIA at 4.

<sup>13</sup> *See* 47 U.S.C. § 157(b) (“If the Commission initiates its own proceeding for a new technology or service, such proceeding shall be completed within 12 months after it is initiated.”)

commitment of the Commission to swiftly develop a full record and take action on new technologies and services. Elefante Group believes that moving with deliberate speed in considering new technologies and services will neither impede the Commission's capacity for making thoughtful and informed decisions nor increase the potential for harmful interference to existing licensees.

**A. Concerns About Section 7 Impairing Spectrum Licensing Processes are Unfounded**

Competitive Carriers Association ("CCA") and CTIA have concerns that companies seeking Section 7 treatment for their services or technologies might be enabled to bypass established spectrum licensing processes. CCA claims that "Section 7's proposed inclusion of 'applications for authorizations' could result in . . . allowing companies to gain access to valuable spectrum resources without first engaging in established competitive bidding procedures."<sup>14</sup> However, CCA incorrectly assumes that licenses will be granted through auction. New technologies and services may bring value to spectrum by seeking to take advantage of an ability to operate on a compatible basis with incumbent groups of users, *i.e.*, not seek mutually exclusive access to spectrum. In such cases, auctions are not even permitted.<sup>15</sup> Nonetheless, Elefante Group would agree with CTIA that if particular spectrum is already designated for auction by the adoption of final rules, a Section 7 request should not be granted to access that

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<sup>14</sup> Comments of CCA at 4 (internal citation omitted).

<sup>15</sup> See 47 U.S.C. §§ 309(j)(1), 309(j)(6)(E) (authority of Commission to license through competitive bidding procedures predicated on mutual exclusivity the obligation of the Commission in the public interest to use a variety of "means in order to avoid mutual exclusivity").

spectrum on an exclusive basis that would somehow disrupt the upcoming auction, at least absent extraordinary circumstances.<sup>16</sup>

CTIA also argues “the Commission should ensure that potential applicants cannot seize upon the new Section 7 process to avoid formal rulemakings and skirt regulatory obligations.”<sup>17</sup> Elefante Group agrees with CTIA that, generally, Section 7 applicants and petitioners should not be entitled to a track that does away with formal rulemakings or circumvents regulatory obligations.<sup>18</sup> This does not mean that the Commission cannot act quickly to address proposals regarding new services and technologies.<sup>19</sup> CTIA appears to fear the adoption of a requirement implementing Section 7 that the Commission “render a final decision on applications or petitions for new services or technologies within one year of filing.”<sup>20</sup> But it is unclear to Elefante Group

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<sup>16</sup> See Comments of CTIA at 8. Elefante Group does not concur with CTIA that auctions necessarily put spectrum to its “highest and best use.” See *id.* Rather, all that can be said with any certainty about auction results is that only the winners have access to exclusive spectrum assigned through auctions. Purposes distinct from putting spectrum to its “highest and best use” may motivate auction participants.

<sup>17</sup> *Id.* at 7.

<sup>18</sup> See *NPRM* at ¶ 10 (proposing that Section 7 “rules would not replace or substitute for the Commission’s existing rules for processing petitions,” but would “specify additional steps to ensure that timely decisions are made on Section 7 requests”). The Commission, naturally, can grant waiver requests, as it has done in the past, which would allow new technologies and services qualifying under Section 7 which do not fit under existing rules to be deployed without a formal rulemaking. *Hye Crest Mgmt., Inc.*, Memorandum Opinion and Order, File No. 10380-CF-P-88, 6 FCC Rcd 332, 28 (1991) (by waiver of various allocation and service rules, the Commission granted a license to construct a video distribution system in the 28 GHz band that it found to be “imaginative, technically feasible, and consistent with the statutory mandate of Section 7 of the Communications Act.”)

<sup>19</sup> Section 7 review should not result in any default treatment with respect to spectrum licenses. The Commission should assess each application or petition seeking Section 7 treatment fully on the merits, and the provision still leaves the Commission flexibility with respect to how to proceed. By the same token, there is no reason a Section 7 petition or application might not lead to a new spectrum access framework or one that does not involve competitive bidding.

<sup>20</sup> Comments of CTIA at 7. Yet at the same time, CTIA acknowledges that the Commission should take “concrete action . . . to advance the development and use of new technologies or services that are in the public interest.” *Id.*

why the Commission cannot develop a record and take action within one year if an application is Section 7-worthy. The Commission has moved swiftly, for example, to launch rulemakings and make decisions in several very complex proceedings in recent years, both in the 3.5 GHz proceeding and the *Spectrum Frontiers* docket to name two examples.

In the end, the Section 7 review process need not be about streamlining or bypassing licensing processes,<sup>21</sup> but instead be about accelerating their establishment to accommodate new services and technologies. Favorable treatment of Elefante Group's Section 7 request, for example, would accelerate the process of enabling new technologies and services but would not establish licenses by default without a rulemaking or circumvent any licensing process that the Commission would establish in support of SBCS.

**B. Prompt Section 7 Review Will Not Interfere with the Commission's Deliberative Process**

In considering the one-year deadline for Commission action on a Section 7 request contained in the statute, TIA is concerned that "certain innovations [may] require more time and effort" and that "a strict one-year deadline might negatively impact the Commission's deliberative process."<sup>22</sup> Elefante Group submits that TIA ignores that fact that the one-year requirement is imposed by statute and is not within the Commission's discretion.

TIA suggests that the Commission should have the ability to extend the statutory one-year deadline, at the same time recognizing that "the goal in most Section 7 proceedings should be to issue a final decision within a year of the filing."<sup>23</sup> Section 7 does not contain language

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<sup>21</sup> In further response to CCA and CTIA, Elefante Group also notes that, while Section 7 leaves the agency plenty of discretion, there is no reason to believe the process would be abused. Moreover, any decision that Commission makes in a Section 7 case – including the adoption of rules in this proceeding – would be subject at some point to administrative and judicial review.

<sup>22</sup> Comments of TIA at 1-2.

<sup>23</sup> *See id.* at 6-8.

that supports such an extension and, in any event, Elefante Group submits that the discretion to extend could eviscerate Congress's intentions behind Section 7. Moreover, in certain contexts, the concrete action the Commission might take may be limited, but in the case of a petition for rulemaking it is unclear what concrete action can be taken other than grant or denial that would not appear to be dilatory in a Section 7 context.<sup>24</sup>

To ensure that the Commission can act within one year, it is reasonable to require that petitions and applications seeking Section 7 treatment provide a certain requisite level of support to provide the agency with ample information to make the initial determination that the submission merits Section 7 consideration and, if so, take concrete action within the Act's timeframe. If a Section 7 request is inadequately supported, then the one-year clock would not begin to run. If, on the other hand, a Section 7 request is sufficiently supported, the Commission should be able to act within one year, as Chairman Pai has stated the Commission should be able to do supported by rules adopted in this proceeding.<sup>25</sup> Making the determination as to the sufficiency of the petition or application to be accorded Section 7 consideration should be part of the Commission's initial review, as proposed in the *NPRM*.

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<sup>24</sup> As noted above, the Act already provides that the Commission, if it initiates a proceeding involving a new service or technology qualifying for Section 7 treatment, is to complete such proceeding within one year. 47 U.S.C. § 157(b). Elefante Group submits that it is difficult to reconcile that provision with the first part of Section 7(b) which concerns action by the Commission in response to a petition or application within one year, unless action on the petition or application – *i.e.*, grant or denial – occurs within one year. *Id.*

<sup>25</sup> Ajit Pai, FCC Chairman, Blog: "Innovation Month at the FCC," available at <https://www.fcc.gov/news-events/blog/2018/02/01/innovation-month-fcc> (last visited on June 20, 2018) (The *NPRM* "aims to codify Section 7's commitment to prompt action in the Commission's rules," namely a "respon[se] to petitions or applications proposing new technologies and services within one year.").



**C. The Commission Should Give Effect to the Statute’s Requirement that Opponents of Section 7 Requests Have the Burden of Proof**

The Free State Foundation (“FSF”) notes that “competitor petitions ‘to deny or oppose the introduction of new technologies or services’ can delay or prohibit public interest benefits to consumers.”<sup>26</sup> The Act requires opponents of Section 7 requests to satisfy a burden of proof that the proposed new service or technology is not in the public interest.<sup>27</sup> Elefante Group agrees with the Commission proposal that “opponents [of Section 7 requests must] address the potential public interest associated with the proposed technology or service, not their own private interests.”<sup>28</sup>

FSF recommends that the Commission “adopt a rebuttable presumption that applications and permits determined by the Commission to offer a ‘new technology or service’ within the scope of Section 7 are in the public interest absent clear and convincing evidence to the contrary.”<sup>29</sup> While FSF’s concerns about the dilatory tactics of incumbents may prove well-founded in specific circumstances, creating a presumption for grant of the license or application is not necessarily required for the Commission to discount improperly motivated oppositions.

**D. There is No Basis for Concern that Section 7 Review Will Inherently Result in Harmful Interference to Existing Services**

Elefante Group submits that among the most innovative new technologies to be introduced in the near future may be those that involve sharing spectrum with existing co-band or adjacent band users. As is clear from its recently filed Petition, Elefante Group submits that SBCS be introduced in encumbered spectrum. Elefante Group supported its Petition with

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<sup>26</sup> See Comments of the Free State Foundation at 2 (“Comments of FSF”).

<sup>27</sup> See 47 U.S.C. § 157(a).

<sup>28</sup> NPRM at ¶ 25. See also *id.* at ¶ 7 (opponents often motivated to oppose innovation that would serve the public that has adverse economic impact on their own services).

<sup>29</sup> See Comments of FSF at 3.

summaries of twenty of the compatibility studies it undertook to examine the potential for interference from its operations with co-band incumbent users and other SBCS operators.

In its comments responding to the *NPRM*, the GPS Innovation Alliance (“GPSIA”) contends that new technologies and services that pose a risk of harmful interference to existing operations “raise public interest concerns and should not qualify for the proposed Section 7 expedited treatment.”<sup>30</sup> Elefante Group disagrees on such automatic disqualification, as new spectrum services and deployments often pose some degree of risk of harmful interference, however attenuated it might be. GPSIA is correct insofar as Section 7 review should not result in the approval of technologies that will result in material, unmitigated risk of harmful interference to existing services. However, petitioners or applicants requesting Section 7 treatment that seek access to spectrum occupied by, or adjacent to, other services should include compatibility studies in their applications and other information that assists the Commission in determining whether there will be a risk of harmful interference and, if so, what restrictions, mitigations, or coordination procedures are available or may be appropriate, taking into account, for example, relative priority of access to the spectrum. Commenters in response to a public notice following a Section 7 request should be encouraged to submit relevant information about any interference concerns during the public comment cycle. The sufficiency and feasibility of such mitigation measures or coordination proposals should constitute part of the Commission’s review, as it would in non-Section 7 contexts.

### **III. CONCLUSION**

For the foregoing reasons, the Commission should adopt a rules-based framework to implement and apply Section 7 to satisfy its efforts to promote investment and innovation in the

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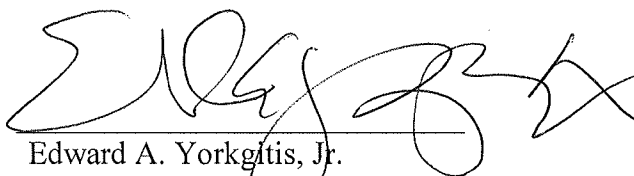
<sup>30</sup> Comments of GPSIA at 5.

communications marketplace to allow the United States to maintain its communications service and technology leadership within the world. While Section 7 rules would be part of a larger array of measures the Commission should take to achieve these ends, such rules would confer more certainty for developers of new technologies and services and constitute an important element of forward-looking national communications and spectrum policies.

Respectfully submitted,

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A handwritten signature in black ink, appearing to read 'E. Yorkgitis, Jr.', written over a horizontal line.

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